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Supreme Court, U.S.
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No. 97-2040

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1997

GRINNELL CORPORATION,

*Petitioner,*

v.

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669;
UNITED ASSOCIATION OF THE PLUMBING AND PIPEFITTING
INDUSTRY OF THE UNITED STATES AND CANADA,

*Respondents.*

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

## REPLY BRIEF FOR PETITIONER

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Respondents have failed to offer any persuasive response to Grinnell's showing that this Court's review is necessary and appropriate in this case. The decision below raises recurring issues of law that have divided the circuits, and decides important federal questions in a manner that is irreconcilable with controlling decisions of this Court. For the reasons set forth below and in the petition, certiorari should be granted.

## I. REVIEW IS WARRANTED TO RESOLVE THE WIDENING CIRCUIT CONFLICT OVER THE PROPRIETY OF THE HEIGHTENED PROOF STANDARD APPLIED BELOW

As Grinnell explained in its petition, the question whether *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), imposes a heightened proof standard at the summary judgment stage in all antitrust conspiracy cases is an important and recurring question that has divided the circuits. All but conceding the certworthy nature of that question, respondents instead go to great lengths in an attempt to deny that this case presents that issue. *See* Br. in Opp. 3-13. Respondents' efforts are of no avail, however, because both courts below expressly applied the very standard that gives rise to the circuit conflict.

### A. The Question Whether *Matsushita* Imposes A Heightened Proof Requirement In All Antitrust Conspiracy Cases Is Properly Presented In This Case

1. Respondents selectively quote at length from the opinion of the district court (*see* Br. in Opp. 6-8) in support of their assertion that "this case was decided on . . . well-settled general summary judgment principles" rather than the heightened "*Matsushita* antitrust law standard for evaluating 'ambiguous evidence' regarding an 'illegal conspiracy.'" *Id.* at 5. Strikingly, however, respondents' liberal use of quotations does not extend to the district court's statement of the summary judgment standard it felt bound to apply in this case. Indeed, nowhere in respondents' brief

is there any acknowledgement of that statement, which the district court set forth in the clearest possible terms. The language omitted from respondents' brief is worth repeating here, because it removes any possible doubt about whether the district court applied the Fourth Circuit's heightened proof requirement in evaluating the evidence put forward by Grinnell: "To avoid the entry of summary judgment against it in an antitrust case on the ground that proof of conspiracy does not exist, . . . the plaintiff must 'bring forth evidence that *excludes the possibility* that the alleged coconspirators acted independently or based on a legitimate business purpose.'" Pet. App. 22a-23a (quoting *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 543 (4th Cir. 1991)) (emphasis added).

Likewise, and more importantly, the decision that this Court would actually be reviewing -- that of the court of appeals -- is equally explicit in announcing the heightened summary judgment standard against which Grinnell's evidence was inappropriately measured. The court of appeals expressly reiterated its heightened proof standard for antitrust conspiracy claims in its opinion below, stating that "to survive a summary judgment motion an antitrust plaintiff must . . . 'bring forward evidence that *excludes the possibility* that the alleged co-conspirators acted independently or based on a legitimate business purpose.'" Pet. App. 4a (quoting *Laurel Sand & Gravel*, 924 F.2d at 542-43) (emphasis added). Lest any doubt remain on that score, the court of appeals also emphasized that, in keeping with its interpretation of *Matsushita*, "conduct as consistent with permissible competition as with illegal conspiracy, does not, standing alone, support an inference of anti-trust conspiracy." Pet. App. 4a.

Thus, contrary to respondents' assertions, it is unambiguously clear on the face of the opinions below that both the district court and the court of appeals announced and adhered to the heightened summary judgment standard at

issue in Grinnell's petition.[1] To be sure, the district court examined the record evidence in light of this standard and purported to find it lacking, but that fact does not militate against review. The key point is that the rule of law applied by the courts below in granting summary judgment was unduly stringent, and conflicts with the approach followed by other courts of appeals.[2]

2. Respondents next contend (Br. in Opp. 8-9) that Grinnell is precluded from challenging the Fourth Circuit's heightened proof requirement because this issue was not briefed below. Respondents' contention is without merit.

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1 Respondents' claims to the contrary are belied both by the language used in the opinions below and by respondents' brief in the court of appeals, which (in contrast to their brief in opposition in this Court) was laced with repeated references to, and heavy reliance on, the heightened proof standard enunciated by the Fourth Circuit in *Laurel Sand & Gravel*. *See, e.g.*, Resp. C.A. Br. 15 (quoting *Laurel Sand* standard), 16 (citing *Laurel Sand* for the proposition that affirmance would be required "if Grinnell has failed to rule out a 'possible and plausible' legitimate explanation" for defendants' conduct, even if "inferences of concerted illegal activity could arguably be drawn" from the evidence), 29 (arguing that Grinnell's claim "cannot survive the application of the *Laurel Sand & Gravel* twofold evidentiary burden"), 32 (asserting that "Grinnell's purported proof . . . does not satisfy the *Laurel Sand & Gravel* standard").

2 Grinnell will not attempt to address respondents' various mischaracterizations of the record evidence that supports Grinnell's claims, other than to note that, as demonstrated in the petition (Pet. 2-7), the evidence was more than sufficient to preclude entry of summary judgment when measured against traditional summary judgment principles. Contrary to respondents' implication (Br. in Opp. 12-13), Grinnell is not asking this Court to review the lower courts' weighing of the evidence against the standard applied below; rather, Grinnell asks this Court to hold that the court of appeals (and the other circuits that follow a similar approach) erred as a matter of law in imposing a heightened proof requirement in all antitrust conspiracy cases.

For obvious reasons, Grinnell did not ask the three-judge panel that heard this case to overrule binding Fourth Circuit precedents mandating a heightened proof standard in antitrust conspiracy cases. That standard has been applied repeatedly by the court of appeals in prior cases (*see* Pet. 12-13), and Grinnell had no alternative but to acknowledge that fact in the courts below.[3] It would be absurd, and inconsistent with this Court's supervisory role, to hold that review of a particular circuit's long-established rule of law is precluded unless the petitioner has engaged in the pointless endeavor of asking the panel below to overturn controlling circuit precedent.

Not surprisingly, this Court has expressly refused to limit the scope of its review in the manner suggested by respondents. To the contrary, the Court has repeatedly made clear that it will consider questions of federal law that were *either* "pressed" *or* "passed upon" in the court below. As the Court explained in *United States v. Williams*, 504 U.S. 36 (1992), "Our traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.' . . . . That *this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon*, is illustrated by some of our more recent dispositions." *Id.*

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[3] Grinnell did assert below, however, that summary judgment procedures should be used only "'sparingly in complex antitrust litigation'" and that "'[a]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter.'" Pet. C.A. Br. 10 (quoting *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). Moreover, Grinnell argued that the district court violated these principles by "decid[ing] factual issues that should have been reserved for the jury." Pet. C.A. Br. 11. Thus, contrary to respondents' implication, Grinnell (while acknowledging the Fourth Circuit's heightened proof standard, as it was required to do) did not embrace that heightened standard.

at 41 (citing cases; emphasis added). *See, e.g., Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("Respondents argue that this issue was not raised below. . . . *It suffices for our purposes that the court below passed on the issue presented*, particularly where the issue is, we believe, "'in a state of evolving definition and uncertainty,"' and one of importance to the administration of federal law.") (citations omitted; emphasis added).[4]

As discussed above, there is no doubt that the court of appeals "passed upon" the question of the summary judgment standard applicable to this case, and chose to apply the Fourth Circuit's heightened proof requirement for antitrust conspiracy claims. Under this Court's settled practice, that fact suffices to preserve the issue for review.

### B. The Summary Judgment Standard Applied By The Court Of Appeals Below Conflicts With The Standards Applied By Other Circuits

1. Respondents attempt to dispute the fact that the Fourth Circuit has adopted a heightened proof requirement for antitrust conspiracy cases. Br. in Opp. 9-11. Respondents' assertion in this regard is at best odd, given their heavy reliance in the court below on what they character-

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[4] The authorities cited by respondents are not to the contrary. In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), the relevant question had neither been pressed *nor* passed upon below. *Id.* at 147 n.2 ("petitioner never raised any issue concerning the 1875 statute before the Court of Appeals" and "the Second Circuit did not rule on these contentions"). Similarly, there is no indication in *Auer v. Robbins*, 117 S. Ct. 905, 912 (1997), that the relevant question was passed upon below. Finally, *Illinois v. Gates*, 462 U.S. 213 (1983), is inapposite, as that case arose in the entirely different context of this Court's review of state court decisions. In that context, considerations of comity and limited jurisdiction -- considerations that are wholly absent here -- have generally led this Court to decline to consider questions not raised below. *Id.* at 217-22.

ized as the special "'twofold evidentiary burden' placed on an antitrust plaintiff" by *Laurel Sand & Gravel*. Resp. C.A. Br. 15; *see* note 1, *supra*. In any event, respondents' newly developed skepticism regarding the existence of a heightened proof standard is unfounded.

Respondents point to language in *Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1322-23 (4th Cir. 1995), purporting to acknowledge that traditional summary judgment principles are applicable in antitrust cases as well. Br. in Opp. 9. But the *Thompson Everett* court went on to hold that the rules are in fact different in the antitrust context: "[T]he inferences which may be drawn vary from one substantive area of the law to another. Thus, on summary judgment motions *in antitrust cases*, . . . when there is evidence of conduct that is consistent with both legitimate competition and an illegal conspiracy, courts may not infer that an illegal conspiracy has occurred without other evidence." 57 F.3d at 1323 (emphasis added); *accord* Pet. App. 4a.

There can be no doubt that this rule of law -- which is expressly limited to the antitrust context -- amounts to a heightened proof requirement. As the Ninth Circuit has cogently observed, a rule "suggesting that a district court may grant summary judgment to antitrust defendants whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are equally plausible . . . . would lead to a dramatic judicial encroachment on the province of the jury," effectively abolishing "traditional summary judgment rules in the antitrust context . . . and replac[ing] them with an entirely different set." *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 438 (9th Cir. 1990). For precisely that reason, the Ninth Circuit has refused to read *Matsushita* in the sweeping fashion adopted below. The Fourth Circuit, however, continues to adhere to its contrary approach. *See* Pet. 12-13; Pet. App. 4a.

In no other area of the law is a plaintiff's lawsuit subject to dismissal on summary judgment unless the plaintiff

"bring[s] forward evidence that *excludes the possibility*" that the defendants acted properly. Pet. App. 4a. The Fourth Circuit has repeatedly imposed that requirement on plaintiffs in antitrust conspiracy cases, including Grinnell in this case. That ongoing practice should not escape the attention of this Court.

2. Respondents halfheartedly contend (Br. in Opp. 11-13 n.2) that the circuits are not divided over the propriety of the heightened proof requirement applied by the court below. Glossing over the fact that at least one court of appeals has expressly recognized, and intentionally exacerbated, the existence of this circuit conflict (*see Corner Pocket of Sioux Falls, Inc. v. Video Lottery Tech., Inc.*, 123 F.3d 1107, 1109 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1054 (1998)), respondents blithely contend that the federal appellate courts have in fact been "remarkably uniform" in their treatment of *Matsushita*. Br. in Opp. 13 n.2.

There is little that needs to be said in response to this contention. As amply demonstrated in the petition (Pet. 12-17), and as a review of the relevant cases will convincingly demonstrate, the courts of appeals continue to disagree over the most fundamental question concerning the summary judgment standard announced in *Matsushita*: Does the heightened skepticism of antitrust conspiracy claims enunciated in *Matsushita* apply across the board to all such claims -- as the Fourth, Seventh, and Eighth Circuits have held -- or are courts like the Third and Ninth Circuits instead correct in holding that *Matsushita*'s heightened standard is limited to unusual cases, unlike this one, in which the plaintiff's theory of liability is inherently implausible and/or potentially anticompetitive? That fundamental question can be answered only by this Court, and it should be answered in this case.

## II. THE ERRONEOUS INTERPRETATION OF THE NONSTATUTORY LABOR EXEMPTION ADOPTED BY THE COURTS BELOW IS WORTHY OF REVIEW BY THIS COURT

Respondents assert (Br. in Opp. 14-15) that the decision below is not in conflict with *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), because the district court purported to apply the three-part test announced in *Mackey*. To the contrary, however, the decision below is directly inconsistent with *Mackey*. The first *Mackey* prong requires a showing that "the restraint on trade primarily affects only the parties *to the collective bargaining relationship*." 543 F.2d at 614 (emphasis added). The district court departed substantially from this prong by effectively eliminating the italicized phrase from its version of the test, instead asking only whether the defendants' agreement to withdraw targeting from non-members of the NFSA bargaining unit was exempt from liability because it "primarily affected the parties themselves." Pet. App. 32a. It is beyond dispute that the entities primarily affected by the agreement to withdraw job targeting (*i.e.*, Grinnell and other non-NFSA contractors) were not parties *to the collective bargaining relationship*, as they had explicitly refused to be represented by NFSA in that relationship. Thus, far from representing a fact-bound application of the *Mackey* test, the decision below actually reflects a substantial modification of that test. And in any event, respondents implicitly concede Grinnell's showing that the decision below also conflicts with *Sheet Metal Workers Local Union No. 54, AFL-CIO v. E.F. Etie Sheet Metal Co.*, 1 F.3d 1464, 1475 (5th Cir. 1993) (*see* Pet. 22), further demonstrating the necessity of this Court's review.[5]

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[5] There is no merit to respondents' implication (Br. in Opp. 15) that *Local Union 257, Int'l Bhd. of Elec. Workers v. Sebastian Elec.*, 121 F.3d 1180 (8th Cir. 1997), and *Phoenix Elec. Co. v. National Elec. Contractors Ass'n*, 81 F.3d 858 (9th Cir. 1996), reached the same result as the decision below. Neither of those

Respondents offer virtually no response to the merits of Grinnell's showing (Pet. 22-25) that the decision below is irreconcilable with *Amalgamated United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Instead, they fall back on the lower courts' erroneous application of the heightened summary judgment standard to conclude that the evidence was insufficient to support a finding of the requisite conspiracy. Br. in Opp. 16. As discussed above and in the petition, however, the latter determination is certworthy (and incorrect) in its own right, so it hardly provides a basis for denying review of the nonstatutory labor exemption issue. And respondents' silence in the face of Grinnell's legal arguments on this issue cannot hide the fact that the reasoning adopted below reflects a profound departure from the principles that have guided this Court's applications of the nonstatutory labor exemption. *Pennington* squarely holds that an agreement "to impose a certain wage scale on other bargaining units" falls outside the scope of the exemption (381 U.S. at 665), but the courts below reached precisely the opposite conclusion. The court of appeals has thus "decided an important federal question in a way that conflicts with relevant decisions of this Court," and certiorari is warranted. Sup. Ct. R. 10(c).

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cases involved a conspiracy to *withdraw* job targeting from nonmembers of the bargaining unit; instead, those cases involved challenges to the very *existence* of job targeting programs. It is one thing to hold, as these courts have done, that a job targeting program established between the parties to a collective bargaining agreement "primarily affects only the parties to the collective bargaining relationship"; it is quite another thing to hold that an agreement to *withdraw* targeting *only* from *non*-parties to the collective bargaining agreement falls into the same category.

## III. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE AUTHORITIES REGARDING THE EXISTENCE OF A PREDATORY INTENT REQUIREMENT

Respondents do not, and cannot, challenge Grinnell's showing (Pet. 26-27) that numerous courts (including this Court) hold that predatory intent is not a necessary element of a claim asserted under Section 1 of the Sherman Act. Nor do respondents dispute the fact that the court below has nonetheless engrafted precisely such an element onto the Sherman Act in cases involving claims against labor unions who conspire with employers to limit competition. And finally, respondents implicitly concede (as they must) that this Court has instructed that antitrust claims arising out of non-exempt labor-management agreements (like the agreements at issue here) should be evaluated under the same legal principles applicable to antitrust cases generally. *See* Pet. 28 (citing cases).

These concessions speak volumes, for they compel the conclusion that review by this Court is necessary to address the glaring inconsistency created by the lower courts' disparate treatment of antitrust claims asserted against labor unions. If, as Grinnell has shown (and as respondents have conceded), Section 1 claims do not require proof of predatory intent, and claims against labor unions are to be treated the same as other antitrust claims once the labor exemption issue has been disposed of, it necessarily follows that the special predatory intent requirement imposed by the court below (and by a handful of other circuits) in *Pennington*-type cases is impossible to reconcile with basic principles of antitrust law as enunciated by this and other Courts.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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